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Butterfield Lumber, Inc. v. Jon L. McCoy, McCloy Construction, James A. Arrowsmith, Gayle Z. Arrowsmith, Peterson Mortgage Corporation, Ideal Concrete Corporation, Reid's Concrete Service, INC, Davis Brothers Cabinetmakers, INC, and John Doe I : Brief of Appellant

Utah Court of Appeals

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DOCKET NO. _____ IN THE UTAH COURT OF APPEALS

BUTTERFIELD LUMBER, INC., Plaintiff and Appellee, v. JON L. McCLOY, d/b/a McCLOY CONSTRUCTION, JAMES A. ARROW-SMITH, GAYLE Z. ARROWSMITH, PETERSON MORTGAGE CORPORATION, IDEAL CONCRETE CORPORATION, REID'S CONCRETE SERVICE, INC., DAVIS BROTHERS CABINETMAKERS, INC., and JOHN DOE I, Defendant and Appellant,	No. 900425-CA BRIEF OF APPELLANT priority #16

APPEAL FROM ORDER AND SUMMARY JUDGMENT OF THE THIRD JUDICIAL CIRCUIT COURT IN AND FOR SALT LAKE COUNTY, SALT LAKE DEPARTMENT, STATE OF UTAH, THE HONORABLE PAUL G. GRANT

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JURISDICTIONAL STATEMENT AND NATURE OF PROCEEDINGS IN CIRCUIT COURT

The Utah Court of Appeals has jurisdiction to hear this appeal pursuant to the Utah Constitution Article VIII, Section 3, and Utah Code Annotated, Section 78-2a-3(2)(d).

The proceedings below consist of a suit by Plaintiff Butterfield Lumber, Inc. ("Butterfield"), seeking from Defendants $4,250.00 plus interest, attorneys' fees and costs based upon Butterfield's supplying of materials used in the construction of a residence on the subject real property (the "Property"). Butterfield's claim against Appellant Peterson Mortgage Corporation ("Peterson Mortgage") was confined to Butterfield's Third Claim for Relief seeking foreclosure of a mechanics's lien, plus attorneys' fees and costs.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issues presented for review on this appeal are as follows:

A. Whether a mechanic's lien attaches to the proceeds from a sale of real property to an innocent third-party purchaser after the lienor has failed to file a notice of "lis pendens" as required by Section 38-1-11, U.C.A. (1953), and has thus failed to preserve the lienor's "in rem" rights in the real property as contemplated by Section 38-1-3, U.C.A. (1953). In deciding whether

the trial court properly granted judgment as a matter of law, the appellate court gives no deference to the trial court's construction of a statute. Ron Case Roofing and Asphalt Paving, Inc. v. Blomquist, 773 P.2d 1382 (Utah 1989); Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884 (Utah 1988).

B. Whether a recorded notice of lien that was not properly acknowledged pursuant to Section 57-3-1, U.C.A. (1953), in effect at the pertinent time, perfected a mechanic's lien as contemplated by § 38-1-7, U.C.A. (1953). In deciding whether the trial court properly denied Peterson Mortgage's Motion to Dismiss as a matter of law in construing a statute, the appellate court gives no deference to the trial court's interpretation of the law. Ron Case Roofing and Asphalt Paving, Inc., supra; Forbes v. St. Mark's Hosp., 754 P.2d 933 (Utah 1988).

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

The determinative constitutional provisions of the Utah Constitution, and the determinative statutes of the State of Utah read verbatim as follows:

UTAH CODE ANN. SECTION 38-1-3.

> Contractors, subcontractors, and all persons performing any services or furnishing or renting any materials or equipment used in the construction, alteration, or improvement of any building or structure or improvement to any premises in any manner and licensed architects and engineers and artisans who have

furnished designs, plats, plans, maps, specifications, drawings, estimates of cost, surveys or superintendence, or who have rendered other like professional service, or bestowed labor, shall have a lien upon the property upon or concerning which they have rendered service, performed labor, or furnished or rented materials or equipment for the value of the service rendered, labor performed, or materials or equipment furnished or rented by each respectively, whether at the instance of the owner or of any other person acting by his authority as agent, contractor, or otherwise. This lien shall attach only to such interest as the owner may have in the property.

UTAH CODE ANN. SECTION 38-1-7.

(1) Every original contractor within 100 days after the completion of his contract, and except as provided in this section, every person other than the original contractor who claims the benefit of this chapter within 80 days after furnishing the last material or performing the last labor for or on any land, building, improvement, or structure shall file for record with the county recorder of the county in which the property, or some part of the property,is situated, a written notice to hold and claim a lien.

(2) This notice shall contain a statement setting forth the following information:

(a) the name of the reputed owner if known or, if not known, the name of the record owner;

(b) the name of the person by whom he was employed or to whom he furnished the material;

(c) the time when the first and last labor was performed, or the first and last material was furnished ;

(d) a description of the property, sufficient for identification; and

(e) the signature of the lien claimant or his authorized agent, and the date signed.

(3) Within 30 days after filing the notice of lien, the lien claimant shall deliver or mail by certified mail to either the reputed owner or record owner of the real property a copy of the notice of lien. If the record owner's current address is not readily available, the copy of the claim may be mailed to the last-known address of the record owner, using the names and addresses appearing on the last completed real property assessment rolls of the county where the affected property is located. Failure to deliver or mail the notice of lien to the reputed owner or record owner precludes the lien claimant from an award of costs and attorneys' fees against the reputed owner or record owner in an action to enforce the lien.

(4) When a subcontractor or any person furnishes labor or material as stated in Subsections (1) through (3) at the request of an original contractor, then the final date for the filing of a notice of intention to hold and claim a lien for a subcontractor or a person furnishing labor or material at the request of an original contractor is 80 days after completion of the original contract of the original contractor.

UTAH CODE ANN. SEC. 38-1-11.

Actions to enforce the liens herein provided for must be begun within twelve months after the completion of the original contract, or the suspension of work thereunder for a period of thirty days. Within the twelve months herein mentioned the lien claimant shall file for record with the county recorder of each county in which the lien is recorded a notice of the pendency of the action, in the manner provided in actions affecting the title or right to possession of real property, or the lien shall be void, except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action, and the burden of

proof shall be upon the lien claimant and those claiming under him to show such actual knowledge. Nothing herein contained shall be construed to impair or affect the right of any person to whom a debt may be due for any work done or materials furnished to maintain a personal action to recover the same.

UTAH CODE ANN. SEC. 57-1-1.

The term "conveyance" as used in this title shall be construed to embrace every instrument in writing by which any real estate, or interest in real estate, is created, aliened, mortgaged, encumbered or assigned, except wills, and leases for a term not exceeding one year.

UTAH CODE ANN. SEC. 57-2-1.

Every conveyance in writing whereby any real estate is conveyed or may be affected shall be acknowledged or proved and certified in the manner hereinafter provided.

UTAH CODE ANN. SEC. 57-3-1.

A certificate of the acknowledgment of any conveyance, or of the proof of the execution thereof as provided in this title, signed and certified by the officer taking the same as provided in this title, shall entitle such conveyance, with the certificate or certificates aforesaid, to be recorded in the office of the recorder of the county in which the real estate is situated.

UTAH CODE ANN. SEC. 57-4a-1.

Each document executed and acknowledged on or before July 1, 1988, may be recorded in the office of the county recorder regardless of any defect or irregularity in its execution, attestation, or acknowledgment.

STATEMENT OF THE CASE

Butterfield filed suit April 6, 1988, seeking $4,250.00 plus interest, attorneys' fees and costs based upon Butterfield supplying materials used in the construction of a residence on the Property. Butterfield's claim against Peterson Mortgage was confined to Butterfield's Third Claim for Relief, which sought only foreclosure of Butterfield's claimed mechanic's lien (the "**Mechanic's Lien**"), plus attorneys' fees and costs. By its Third Claim for Relief, Butterfield claimed that the Mechanic's Lien had priority over Peterson Mortgage's trust deed (the "**Trust Deed**") on the Property, which Trust Deed had been recorded one hour and 38 minutes after Butterfield first supplied materials for use in improving the Property.

Peterson Mortgage filed a timely motion to dismiss (the "**Motion to Dismiss**") based upon Butterfield's failure to have its Notice of Mechanic's Lien (the "**Notice**") acknowledged as required by § 57-3-1 (1953). The trial court denied the Motion to Dismiss pursuant to its written Decision of June 28, 1989.

Butterfield then filed a Motion for Summary Judgment (the "**Motion for Summary Judgment**"), requesting the Court to determine that the Lien had priority over the Trust Deed and ordering Peterson Mortgage to pay Butterfield the principal amount of Butterfield's claim, plus interest, attorneys' fees and costs. Peterson Mortgage opposed the Motion for Summary Judgment because

after that time Peterson Mortgage owned no interest in the Property, Butterfield had failed to file and record a notice of "lis pendens' with respect to this action, and the Mechanic's Lien did not attach to any proceeds from the sale of the Property to anyone. The trial court granted the Motion for Summary Judgment pursuant to its written Memorandum Decision of March 1, 1990.

After issuing a subsequent written Memorandum Decision of June 15, 1990, modifying its earlier decision with respect to the amount of principal, interest and attorneys fees recoverable by Butterfield from Peterson Mortgage, the trial court entered its Order and Judgment on July 12, 1990, requiring Peterson Mortgage to pay to Butterfield the principal amount of $4,043.80, plus interest, attorneys' fees and costs as stated in the Order and Judgment.

STATEMENT OF THE FACTS

No genuine issue of fact exists as to any of the following material facts. All references in this Brief of Appellant are to pages in the record on appeal. Copies of the Decision dated June 28, 1989, Memorandum Decision dated March 1, 1990, Memorandum Decision dated June 15, 1990, and Order and Judgment dated July 12, 1990, are included in the Addendum.

1. Butterfield supplied building materials for the construction of a private residence, whose owner and contractor failed to pay for the materials. (Record at 237).

2. Neither the owner of the Property nor the contractor paid Butterfield the $4,043.80 owed to Butterfield for such materials. (Record at 237.)

3. Peterson Mortgage was the primary construction lender with respect to the Property, which loan was secured by the Trust Deed. (Record at 237.)

4. The owner executed a December 31, 1986 promissory note in favor of Peterson Mortgage in the principal amount of $155,000.00, which note was secured by the Trust Deed of even date. (Record at 106, 238).

5. Construction work on the Property began on January 9, 1987, at 3:00 p.m., and Peterson Mortgage recorded the trust Deed on January 9, 1987, at 4:38 p.m. (Record at 238).

6. On June 18, 1987, Butterfield caused the Notice to be recorded, which Notice had not been acknowledged. (Record at 35, 238).

7. On April 6, 1988, Butterfield filed this action seeking, among other relief, foreclosure of Peterson Mortgage's interest in the Property. (Record at 238).

8. At no time pertinent hereto has Butterfield filed for record a "lis pendens" as contemplated by § 38-1-11 U.C.A. (1953). (Record at 134).

9. On August 15, 1988 pursuant to a non-judicial foreclosure under the Trust Deed the Property was sold to Leon Peterson, an individual. (Record at 238).

10. At all times pertinent hereto, Leon Peterson was president of Peterson Mortgage. (Record at 238-39).

11. On January 13, 1989, Leon Peterson sold the property to Peter H. Wright-Clark ("Wright-Clark"), who had no constructive or actual notice of the pendency of this action. (Record at 239).

12. The date on which the last materials were furnished by Butterfield to the property was April 10, 1987. (Record at 134).

13. Wright-Clark acquired the Property over 21 months after materials were last delivered by Butterfield to the Property, and over nine months after Butterfield was required to have filed any notice of lis pendens which could have affected Wright-Clark's interest in the Property. (Record at 135).

SUMMARY OF ARGUMENTS

I. Butterfield, as the one-time owner of a mechanic's lien in the Property, has no rights to any proceeds from the sale of the Property, because § Section 38-1-3 states that any lien held by Butterfield could only attach to the Property rather than any proceeds of sale of the Property. Peterson Mortgage sold the Property to Leon Peterson, and Leon Peterson sold the Property to

Wright-Clark, an innocent third-party purchaser. Wright-Clark was an innocent third-party purchaser because Butterfield failed to preserve its rights in the Property as contemplated by § 38-1-3 by failing to file a notice of lis pendens as required by § 38-1-11. Under the circumstances, the foreclosure of any interest of Peterson Mortgage in and to the Property as alleged in the Third Claim for Relief was moot. At the same time, Butterfield no longer had any cause of action against Peterson Mortgage because the Lien had been extinguished when title passed to Wright-Clark. Upon such extinction of the Lien, no security interest survived to attach to any other real or personal property owned by Peterson Mortgage or anyone else. Therefore, the trial court erred in awarding any unpled person judgment against Peterson Mortgage.

II. Because the Notice was not acknowledged pursuant to § 57-3-1, U.C.A., in effect at the pertinent time, it was not entitled to recordation and was void. Accordingly, the Trust Deed had priority over the Lien and the trial court erred by failing to grant the Motion to Dismiss.

ARGUMENT

POINT I

BECAUSE BUTTERFIELD FAILED TO TIMELY FILE A NOTICE OF LIS PENDENS AS CONTEMPLATED BY § 38-1-11, THE LIEN WAS EXTINGUISHED, AND UNDER § 38-1-3 BUTTERFIELD HAD NO LIEN ON ANY PROCEEDS FROM THE SALE OF THE PROPERTY.

Section 38-1-11, U.C.A., provides in its entirety as follows:

> Actions to enforce the liens herein provided for must be begun within twelve months after the completion of the original contract, or the suspension of work thereunder for a period of thirty days. Within the twelve months herein mentioned the lien claimant shall file for record with the county recorder of each county in which the lien is recorded a notice of the pendency of the action, in the manner provided in actions affecting the title or right to possession of real property, or the lien shall be void, except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action, and the burden of proof shall be upon the lien claimant and those claiming under him to show such actual knowledge. Nothing herein contained shall be construed to impair or affect the right of any person to whom a debt may be due for any work done or materials furnished to maintain a personal action to recover the same. [Emphasis added.]

The Supreme Court has explained that "Mechanics' liens are statutory creatures unknown to the common law. . . . Although liens and pleadings arising under the statute will be liberally construed to effect the desired object, compliance with the statute is required before a party is entitled to the benefits created by

the statute." AAA Fencing Co. v. Raintree Development, 714 P.2d 289, 291 (Utah 1986) (citations omitted).

The only relief pled by Butterfield against Peterson Mortgage was to foreclose the Mechanic's Lien, pursuant to which claim Butterfield merely sought to foreclose Peterson Mortgage's interest in the property. However, by virtue of the trial court's decision, Butterfield ended up "foreclosing" a wholly different kind of lien, not a creature of statue or the common law. At the time of the Motion for Summary Judgment, Peterson Mortgage no longer had any interest in the Property, the Property having been conveyed to Wright-Clark as of January 13, 1989. Because such conveyance took place without any notice of lis pendens being of record, according to § 38-1-11, U.C.A., the Mechanic's Lien Butterfield sought to foreclose against Peterson Mortgage was void because Wright-Clark had no notice of this action. Because Peterson Mortgage had no interest in the Property and the Mechanic's Lien was void as to Wright-Clark, the foreclosure of any interest of Peterson Mortgage in and to the Property was moot, and Butterfield no longer had any cause of action against Peterson Mortgage because the Mechanic's Lien did not exist.

Further, upon such extinction of the Mechanic's Lien, the Mechanic's Lien did not survive to attach to any other real or personal property of Peterson Mortgage. This is clear from § 38-1-3, U.C.A., which provides in its entirety as follows:

> Contractors, subcontractors, and all persons performing any services or furnishing or renting any materials or equipment used in the construction, alteration, or improvement of any building or structure or improvement to any premises in any manner and licensed architects and engineers and artisans who have furnished designs, plats, plans, maps, specifications, drawings, estimates of cost, surveys or superintendence, or who have rendered other like professional service, or bestowed labor, shall have a lien upon the Property upon or concerning which they have rendered service, performed labor, or furnished or rented materials or equipment for the value of the service rendered, labor performed, or materials or equipment furnished or rented by each respectively, whether at the instance of the owner or of any other person acting by his authority as agent, contractor, or otherwise. This lien shall attach only to such interest as the owner may have in the Property. [Emphasis added.]

The foregoing section clearly provides that the statutorily created Mechanic's Lien attached only to an interest in the property itself, which is the real property upon or concerning which Butterfield "furnished or rented materials or equipment." Butterfield did not render service, perform labor or furnish or rent materials or equipment upon or concerning the proceeds from any sale of the Property. In other words, other than the Property, the Mechanic's Lien did not attach to any real or personal property owned by anyone.

We know of no case, when confronted with the clear language of the last sentence of our § 38-1-3, that holds that a mechanic's lien on real property is somehow converted to a lien on the proceeds of any sale of such real property. Whatever lien

Butterfield had, and according to § 38-1-3 it was a lien only in and to the owner's interest in the Property, was lost when the Property was conveyed to the innocent third-part purchaser and Butterfield had not filed any notice of lis pendens with respect to this action. Clearly, even if we resort to ignoring the clear language of § 38-1-3 in favor of a "balancing of equities," which Butterfield urged before the trial court, such "balancing of equities" favors Peterson Mortgage for the simple reason that Butterfield could have protected itself fully by filing the notice of lis pendens contemplated by § 38-1-11. Having failed to do so, how can Butterfield now be heard to say that the risk of loss should be born by Peterson Mortgage, whose only mistake was that it failed to record its Trust Deed until an hour and 38 minutes after work had commenced on the Property. On the other hand, Butterfield had until April 10, 1989, or approximately 15 months later, to protect its interest in the Property. Butterfield failed to do so by the simple expedient of routinely filing a notice of lis pendens with respect to this action.

Therefore, the trial court erred in granting Butterfield's Motion for Summary Judgment.

POINT II

A NOTICE OF MECHANIC'S LIEN NOT PROPERLY ACKNOWLEDGED PURSUANT TO § 57-3-1, IN EFFECT AT THE PERTINENT TIME, DID NOT PERFECT THE MECHANIC'S LIEN.

A. Because the Notice was not acknowledged, it was not entitled to recordation and was void.

Section 57-3-1, U.C.A., provides in its entirety as follows:

> A certificate of the acknowledgement of any conveyance, or of the proof of the execution thereof as provided in this title, signed and certified by the officer taking the same as provided in this title, shall entitle such conveyance, with the certificate or certificates aforesaid, to be recorded in the office of the recorder of the county in which the real estate is situated.

The Notice was not acknowledged as required by § 57-3-1. Lacking an acknowledgment, a recording is void and of no effect. Doris Trust Company v. Guermbach, 103 Utah 120, 133 P.2d 1003 (1943); see also Wycalis v. Guardian Title of Utah, 780 P.2d 821, 826 (Utah App. 1989); General Glass Corp. v. Mast Const. Co., 766 P.2d 429 (Utah App. 1988) (general requirements of acknowledgement); Mickelsen v. Craigco, Inc., 767 P.2d 561 (Utah 1989) (outlining what constitutes compliance with statute).

Acknowledgments are not mere technicalities, to be dispensed with when convenient. As stated by the Supreme Court of Idaho:

> We believe that the manifest intent of the legislature in requiring a notary public to execute a certificate of acknowledgment is to

> *provide protection against the recording of* false instruments. The sine qua non of this statutory requirement is the involvement of the notary, a public officer in a position of public trust.

Benjamin Franklin Savings & Loan Association v. New Concept Realty and Development, Inc., 107 Idaho 711, 692 P.2d 355 (1984), quoting Farm Bureau Finance Company, Inc. v. Carney, 100 Idaho 745, 605 P.2d 509 (1980).

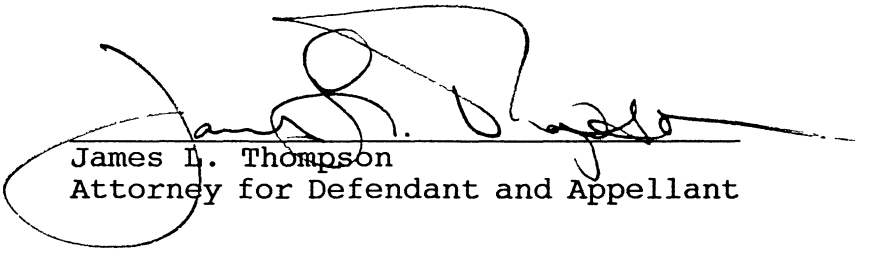
B. The 1989 amendment to the Mechanic's Lien statute did not amend § 57-3-1, which requires an acknowledgment prior to recording and thus the Mechanic's Lien was not perfected.

The 1989 amendment to § 38-1-7, validating notices *unaccompanied by acknowledgements filed between* April 29, 1985, through April 24, 1989, did not amend the Utah Recording Act at § 57-3-1 or modify its requirements. Such amendment, House Bill 62, dealt only with U.C.A. § 38-1-7 -- the Mechanic's Lien statute. When the Notice was recorded by Butterfield, the recording statute provided that an acknowledgment, or certificate thereof, was essential for a valid recording. Inasmuch as House Bill 62 did not specifically exempt mechanic's liens from the requirements of the Recording Act, an acknowledgment is still an essential prerequisite to recordation. Thus, the Notice was invalidly recorded and must be treated as a nullity for failure to comply with Utah law. Since the Notice was void as a matter of law, the Notice failed to timely perfect the Mechanic's Lien as required by § 38-1-7.

CONCLUSION

Butterfield has no lien upon or any other rights in Peterson Mortgage's proceeds of the sale of the Property, nor did Butterfield have a perfected lien on the Property itself. Therefore, the trial court erred by: (1) granting the Motion for Summary Judgment; and (2) failing to grant the Motion to Dismiss. Accordingly, the Order and Judgment should be reversed and the case remanded to the trial court with instructions to dismiss this action as to Peterson Mortgage and award Peterson Mortgage its reasonable attorneys' fees and costs incurred herein.

RESPECTFULLY SUBMITTED this 26th day of October, 1990.



James L. Thompson
Attorney for Defendant and Appellant

\JLT\P\104

ADDENDUM

CERTIFICATE OF SERVICE

DECISION -- dated June 28, 1989

MEMORANDUM DECISION -- dated March 1, 1990

MEMORANDUM DECISION -- dated June 15, 1990

ORDER AND JUDGMENT -- dated July 12, 1990

CERTIFICATE OF SERVICE

I hereby certify that four true and correct copies of the foregoing Brief of Appellant were served this 26th day of October, 1990 by mailing the same by first-class, United States mail, postage prepaid, to:

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Thomas M. Melton (#4999)
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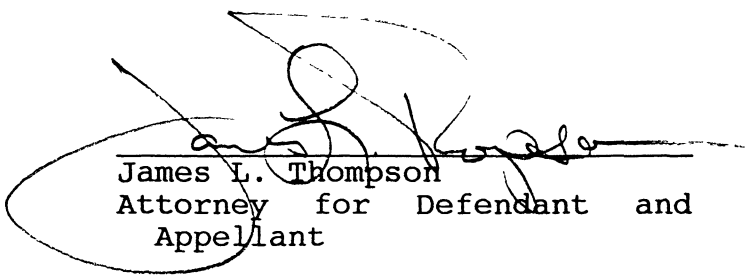

James L. Thompson
Attorney for Defendant and Appellant

JLT\P\104

THIRD CIRCUIT COURT, STATE OF UTAH

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

BUTTERFIELD LUMBER, INC., Plaintiff, vs. PETERSEN MORTGAGE INC. JOHN L. McCLOY dba McCLOY CONSTRUCTION, JAMES A. ARROWSMITH, GAYLE Z. ARROWSMITH CORPORATION, IDEAL CONCRETE CORPORATION, REID'S CONCRETE SERVICE, INC., DAVIS BROS. CABINET MAKERS, INC., and JOHN DOE I, Defendants.	)	D E C I S I O N Civil No. 883003825 CV

This is a motion to dismiss by defendant Petersen Mortgage Inc. The critical issue in this matter is the authority of the County Recorder to receive a document for recording that has not been acknowledged.

The plaintiff filed a notice to claim a lien in accord with the required procedures (32-1-7 UCA 1953) on June 17, 1987. Petersen claims that at the time of filing, all documents that affected real property were required to be acknowledged (57-2-1 UCA 1953, repealed on July 1, 1988) to be received for recordation by the County Recorder (57-3-1 UCA 1953). That without an acknowledgment the document in question should not have been received by the recorders office, and that the recorder acted ultra vires, thus making the notice of lien void and of no legal effect.

A review of the statutory authority of the County Recorder (Section 17-21-et seq. UCA 1953), finds no prohibiting language that limits the receiving of non-acknowledged documents. Section 57-3-1 UCA 1953 as amended bestows a right to record a conveyance or document if acknowledged but does not directly or by implication prohibit the recording of an unacknowledged document (Section 57-3-3 UCA, 1953 limits the effect of a document that is not recorded according to Title 57 to subsequent purchasers, etc.)

The 1988 Legislature enacted Section 57-4a-2 UCA 1953, which dictated that the contents of a recorded document imparted notice regardless of an omission of an acknowledgment. This recent amendment to the code appears to allow the pratical effect of recording even though the document does not meet the full statutory requirements. This seems to satisfy the over-riding purpose of Section 38-1-7 UCA 1953 which is to notify all interested parties in the named property of an intention to perfect a lien.

The court concludes that the county recorder did not commit an ultra vires act when it received and recorded plaintiff's notice of the intention to claim a lien, and that Section 57-4a-2 UCA, 1953 ratified the effectiveness of that notice. The present action is a continuation of the

requirements to establish the lien rights of the plaintiff in the subject property. The action against the defendant is essential to determine the priority rights of all the parties in the real estate in question

Therefore, the court denies defendant's motion to dismiss and allows 10 days for the defendant to file its answer.

Dated this 28 day of June, 1989.

Paul G. Grant
Third Circuit Court Judge

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Decision was mailed, postage, prepaid to Thomas M. Melton, Attorney at Law, City Centre I, Suite 900, 175 E 400 South, Salt Lake City, Utah, 84111 and Kent B. Linebaugh, Attorney at Law, 370 East South Temple, Suite 400, Salt Lake City, Utah, 84111 this 29 day of June, 1989.

THIRD CIRCUIT COURT, STATE OF UTAH

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

BUTTERFIELD LUMBER,	)	
Plaintiff,	)	MEMORANDUM DECISION
vs.	)	Case No. 883003825 CV
PETERSON MORTGAGE CORP.	)	
Defendant.	)	

Plaintiff has moved the Court to determine the legal liability of a specific defendant, Peterson Mortgage Company. The plaintiff, Butterfield Lumber, supplied building materials for the construction of a private residence and perfected a mechanics lien on the property when the owner and contractor failed to pay for the materials. The defendant, Peterson Mortgage, is the primary lender whose financial interest is protected by a trust deed.

The owner has filed for bankruptcy and the general contractor (who has since passed away) are defendants in this action. This motion does not ask for a determination as to their liability.

The plaintiff requests that the court require defendant Peterson Mortgage Corporation to pay over to it the amount claimed in the notice of lien ($4,240.73) because its lien has priority over the defendants trust deed.

Defendant Peterson moves the court for an order dismissing Plaintttiffs "in rem" action against it on the grounds that plaintiff failed to file a lis pendens within the time required by law (31-1-11 U.C.A. 1953), therefore forfeiting its rights in the property and any claim against Petersen.

As between these two parties the following facts appear to be undisputed.

The owners of the property executed a promissory note secured by a trust deed payable to Petersen on December 31, 1986. Construction work began on a new residence on the property on January 9, 1987 at 3:00 p.m, 1953, Peterson filed its trust deed with the recorders office on January 9, 1987 at 4:38 p.m. Plaintiff issued its Notice of Lien within the statutory time as required by Section 38-1-7 U.C.A. 1953, by filing a notice of lien with the County Recorders office on June 18, 1987 and mailing a copy of the notice to the registered owners on the 24th of June, 1987. This action was commenced in April, 1988 and defendant Petersen was served on April 9, 1988.

On April 11, 1988 the trustee of the trust deed gave notice of default and election to sell to all parties of record. After soliciting bids and conducting a public sale the trustee conveyed the property to Leon Petersen as an individual in August 1988. Leon Peterson is president and

registered agent of the defendant, Peterson Mortgage Corp. Both parties agree that Peterson Mortgage and Leon Peterson, had actual notice of plaintiff's claim and lien. Peterson does not dispute the amount of the debt claimed by Plaintiff, and both parties agree that this is an "in rem" action not an "in personam" claim as to this specific defendant.

On January 13, 1989 Leon Peterson sold the property to the present owner, Peter H. Wright-Clark, who had no constructive or actual notice of this action.

The parties to this motion agree that Plaintiff may not foreclose on the real property because of the failure to file a lis pendens as required by Section 38-1-11 U.C.A. 1953 nor may it proceed against the present owner.

A careful review of Utah cases reveals that this case presents a novel issue. The question that is controlling is; "Does a lienholder have rights in the proceeds of a trust deed sale after the lienor has failed to preserve its "in rem" rights in the specific property by failing to file a "lis pendens"?"

The applicable parts of the mechanics lien statute are as follows:

> ... All persons ... furnishing ... any materials ... used in the construction ... of any building ... shall have a lien upon the property upon ... which they have ... furnished ... materials ... for the value of the ... materials ... furnished ... by each respectively, whether at the instance of the owner or any other person acting by his authority as ... contractor ... This lien shall attach only to such interest as the owner may have in the property (Section 38- 1- 3 U.C.A. 1953).
>
> ... Within the twelve months ... the lien claimant shall file for record ... a notice of the pendency of the action ... or the lien shall be void, except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action . . . (Section 38-1-11 U.C.A. 1953).

It is plaintiff's position (a) that past Utah Supreme Court decisions require that a liberal interpretation must be given the mechanics' lien statute to protect materialmen in their unpaid claims, (b) that defendant had actual knowledge of plaintiffs claim and is therefore not absolved of liability even if plaintiff failed to file a lis pendens, and (c) that equity gives the plaintiff the right to transfer its lien to the proceeds of the sale of the property.

Defendant counters with the argument (a) that plaintiff must strictly follow the statutes if it wishes to preserve its claim; (b) that defendant has no personal liability to plaintiff; and (c) that the case before the court is an action to foreclose a lien, the lien no longer exists and is void therefore this action should be dismissed as to this particular defendant.

Basically the court must decide which of the two parties shall suffer the loss resulting from another parties failure

to pay a contractual obligation. This court thinks that plaintiff's position better reflects the purpose of the law and therefore rules that plaintiff's motion for summary judgment should be granted.

The Utah Supreme Court takes a rather strong position that the purpose of the mechanics' lien statute is to protect those lienors who have added directly to the value of the property by furnishing materials upon it. Stanton Transportation Co. v. Davis, 9 Utah2d 184, 341 P2d 207 (1959), Rio Grande Lumber Co. v. Darke, 50 Utah 114, 167 P. 241 (1917). Also that such claims should not be defeated by legal technicalities or nice distinctions. Park City Meat Company v. Comstock Silver Mining Company, 36 Utah 145, 103 P2d 254 (1909).

The public purpose for the requirement of filing a lis pendens is to give notice to subsequent purchasers who lack actual notice, Smith v. Faris-Kesl Const. Co., 150 P. 25 (Idaho 1915). In Harris-Dudley Plumbing Company v. Professional United World Travel Association, Inc.,592 P.2d 586 (Utah 1979) the court preserved a foreclosure action on the liened property after it had been sold at a trust deed sale, because the president of the acquiring corporation was also president of the conveying corporation. Thus the court continued the protection of the lien law even when a lis

pendens had not been filed because the court ruled that the acquiring corporation had notice of the lien and came within the exception stated in Section 38-1-11.

To adopt Defendant's position that plaintiff's action is now void because the lien does not exist and defendant has no personal liability to plaintiff would require a very strict application of the mechanics lien statute. One would be required to ignore the exception contained in section 38-1-11 that declares "except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action". Such an interpretation is not in tune with the previous rulings on the law.

In this case the defendant clearly had actual notice of plaintiff's lien when it sold the specific property to the present owner. Leon Peterson was in the best position to set the sale price and to take into account the potential loss to both Petersen and plaintiff. Plaintiff has a right to have its claim satisfied from the proceeds of the sale to the present owner.

> "It is well understood that when a person has a lien on land . . . and the holder of the legal title disposes of it to one who is an innocent purchaser for value and protected against such lien, the lienholder has the right in equity to have the court transfer his lien to what is received as the consideration for the sale . . ." Morgan Plan Co., Inc v. Bruce, 266 Ala. 494; 97 So.2d 805 (1957).

Plaintiff established a position of priority when work was commenced on the property before defendant filed its trust deed (see Section 38-1-5 U.C.A. 1953). Equity dictates that the priority continues even though the real property has been sold. Judgment to issue for plaintiff in the sum of $4,240.73 plus interest from January 13, 1989 (the date of sale to the present owner) and costs including a reasonable attorneys fee (limited to legal services required as to the issues between these parties).

DATED this 1 day of March, 1990.

Paul G. Grant
Third Circuit Court Judge

MAILING CERTIFICATE

I hereby certify that on the 2nd day of March, 1990, I caused to be mailed, postage prepaid a true and correct copy of the foregoing Memorandum Decision to the folllowing:

PRINCE, YEATES & GELDZAHLER
David K. Broadbent, Esq.
Thomas M. Melton, Esq.
Attorneys for Plaintiff
City Centre I, Suite 900
175 East Fourth South
Salt Lake City, Utah 84111

JARDINE, LINEBAUGH, BROWN & DUNN
Kent B. Linebaugh
Attorney for Defendants
370 East South Temple, Suite 400
Salt Lake City, Utah 84111

D.O.

THIRD CIRCUIT COURT, STATE OF UTAH

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

BUTTERFIELD LUMBER, INC., Plaintiff,	)	MEMORANDUM DECISION
vs.	)	Case No. 883003825 CV
JON L. McCLOY, dba McCLOY CONSTRUCTION, JAMES A. ARROWSMITH, PETERSON MORTGAGE CORPORATION, IDEAL CONCRETE CORPORATION, REID'S CONCRETE SERVICE, INC., DAVIS BROTHERS CABINETMAKERS, INC., AND JOHN DOE I, Defendants.	)	

Defendant, Peterson Mortgage Corporation has objected to plaintiff's proposed order and summary judgment.

Three points of defendants objections are well taken.

First - Amount of lien. These two parties are creditors of a bankrupt owner and a deceased contractor. The defendant had no use of plaintiff's materials until such time as it foreclosed on its Trust Deed and resold the property to a third party. Defendant then became the constructive trustee of plaintiff's proceeds. This point was stated but not explained in the courts memorandum decision indicating that interest was to be allowed after January 13, 1990. The lien amount should be entered in the amount of $4,043.80.

Second - Duplication of time and effort. There are 16 incidents cited in counsels affidavit of attorney's fees

covering inter-office conferences. Three attorneys and one legal assistant worked on the case. That such communication is essential and necessary within a large firm is unquestioned for the smooth operation of the firm. But those are internal matters which do not necessarily go to the question of what is a reasonable attorney's fee for the work required in any given case. Further, the nurturing of junior members of a firm by senior members should be an internal matter not a cost chargeable as a reasonable attorney's fee. The court will therefore require a reduction of the fee in the sum of $350.00.

Third - Preparation for oral argument. The court notes that almost $2,100.00 in fees were generated by the required research and preparation of written documents necessary to prosecute the plaintiffs motion for summary judgment . The court finds that 4 hours would be a reasonable time to assimilate that material and work product in preparation for oral argument plus an hour for court argument for a total of 5 hours at $125.00 per hour. In counsels affidavit of attorney's fees there are five entries reflecting such preparation costs, i.e., September 11, 1989, October 3, 1989, October 13, 1989, November 1, 1989, and November 2, 1989, for a total sum of $1,188.75. As above indicated this sum should be reduced to $625.00. Further, it was clearly established that defendants counsel did not receive notice of the first hearing date. Inasmuch as plaintiff requested oral argument on the motion, defendant should not be required to bear the

burden of the expense of plaintiff's counsel attending when not receiving notice of the hearing date. But of course the time spend for preparation would still be useful at a subsequent hearing. Attorney's fees may therefore be allowed in the sum of $3,747.60.

The finding of fact, conclusions of law and judgment should be submitted in conformity to this decision.

Dated this 15 day of May, 1990

Paul G. Grant
Third Circuit Court Judge

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Memorandum Decision was mailed, postage prepaid to the below mentioned this _____ day of May, 1990.

PRINCE, YEATES & GELDZAHLER
David K. Broadbent
Thomas M. Melton
Attorneys for Plaintiff
City Centre I, Suite 900
175 East Fourth South
Salt Lake City, Utah 84111

JARDINE, LINEBAUGH, BROWN & DUNN
Kent B. Linebaugh
Attorney for Defendants
370 East South Temple, Suite 400
Salt Lake City, Utah 84111

PRINCE, YEATES & GELDZAHLER
David K. Broadbent (0442)
Thomas M. Melton (4999)
Attorneys for Plaintiff
City Centre I, Suite 900
175 East Fourth South
Salt Lake City, Utah 84111
(801) 524-1000

IN THE CIRCUIT COURT, STATE OF UTAH

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

BUTTERFIELD LUMBER, INC., Plaintiff, vs. JON L. McCLOY, d/b/a McCLOY CONSTRUCTION, JAMES A. ARROWSMITH, GAYLE Z. ARROWSMITH, PETERSON MORTGAGE CORPORATION, IDEAL CONCRETE CORPORATION, REID'S CONCRETE SERVICE, INC., DAVIS BROTHERS CABINETMAKERS, INC., and JOHN DOE I, Defendants.	ORDER AND JUDGMENT Civil No. 883003825CV Judge Paul Grant

On March 1, 1990, the Court issued its Memorandum Decision on plaintiff Butterfield Lumber, Inc.'s Motion for Summary Judgment. On June 15, 1990, the Court issued its Memorandum Decision clarifying its prior decision and establishing the terms of the order and judgment in the above-captioned case. In accordance with those Memorandum Decisions,

PRINCE, YEATES
& GELDZAHLER
City Centre I, Suite 900
175 East Fourth South
Salt Lake City
Utah 84111
(801) 524-1000

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Summary Judgment Motion of Plaintiff Butterfield Lumber, Inc., is hereby granted.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid,

IT IS ORDERED, ADJUDGED AND DECREED that Butterfield Lumber recover from defendant Peterson Mortgage Corporation the following sums and amounts:

(a) $4,043.80, the amount of plaintiff's mechanic's lien;

(b) $569.80, interest at the statutory rate of 10%, from January 29, 1989, through June 30, 1990, plus per diem interest at the rate of $1.10 per day until the date of Judgment;

(c) $3,747.60, attorneys' fees as set forth in the Affidavit of Attorneys' Fees submitted with the proposed order and judgment and as set forth in the Court's Memorandum Decision dated June 15, 1990;

(d) Interest on all sums due and owing after the date of judgment at the statutory rate until paid;

(e) The judgment shall be augmented in the amount of reasonable costs and attorneys' fees expended in collecting said judgment by execution or otherwise as shall be established by affidavit.

PRINCE, YEATES
& GELDZAHLER
City Centre I, Suite 900
175 East Fourth South
Salt Lake City
Utah 84111
(801) 524-1000

DATED this 12 day of July, 1990.

BY THE COURT:

Paul G. Grant
District Court Judge

MAILING CERTIFICATE

I hereby certify that, on the _____ day of July, 1990, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing Order and Judgment to the following:

David K. Broadbent, Esq.
Thomas M. Melton, Esq.
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